CALLENDER

v.

MILLER & ORS.

HOUSE OF LORDS
LORD KEITH OF KINKEL,
LORD JAUNCEY OF TULLICHETTLE,
LORD LOWRY, LORD MUSTILL,
LORD SLYNN OF HADLEY
28 JANUARY 1993

SUCCESSION: Deeds of trust disposition and settlement - Fee of residue of estate left to 'surviving issue' and 'surviving great-grandchildren' - Certain great-grandchildren illegitimate at the time the deeds came into operation - Section 1(2) Legitimacy Act 1926 and Scottish common law - Status changed at time of vesting - Legitimation by Legitimacy Act 1959 and Legitimation (Scotland) Act 1968 - Whether great-grandchildren legitimated for purposes of the dispositions and settlements - Intention of the makers of the deeds - Qualification on legitimation - Section 10(2) Legitimacy Act 1926 and s. 7 Legitimation (Scotland) Act 1968 - Effect.

CONFLICT OF LAWS: Limitation of legitimation imposed by Legitimacy Act, 1926 - Whether applicable to instruments governed by Scots law - Section 10(2) Legitimacy Act 1926 and s. 7 Legitimation (Scotland) Act 1968.

The late John Patrick Wright, by a trust disposition and settlement deed, left, *inter alia*, the fee of the residue of the estate, after life rents in favour of his widow, Mrs. Wright, and after her death in favour of his daughter, Mrs. Callender, to such of his grandchildren as should survive the period of distribution, together with the issue of any grandchildren who might have predeceased the period of vesting, equally among them *per stirpes*. Mr. Wright died in 1917.

Mrs. Wright, under an absolute power conferred upon her by the settlement to vary the settlement, exercised the power by three deeds of variation of different dates. She died in 1932, leaving a trust disposition and settlement dated 20 June 1925, the effect of which so far as material was that (a) certain specific funds and (b) the residue of the estate were to be held in life rent for the last survivor of her grandchildren and upon the death of such last survivor to be paid (a) to the surviving great-grandchildren of Mrs. Wright "being children of" her granddaughters and younger grandson and (b) to surving issue of such last surviving grandchild.

Mrs. Callender, the daughter, died in 1953. Of her four children, her son David died in 1977 survived by one son, Rupert David Dundonald Callender. A daughter and a son died without issue in 1982 and 1987 respectively. Hyacinth, the last surviving child died in 1989.

Hyacinth was survived by three children, born respectively in 1942, 1944 and 1946. At the time they were born, Hyacinth was not married to their father, Alfred Holmes, as he was married to someone else, only later becoming free to marry her and doing so in 1954. At all material times, the family was domiciled in England.

The children were, however, not legitimated on the date of the marriage in 1954 because, by virtue of s. 1(2) of the Legitimacy Act 1926, the legitimation provisions of s. 1(1) did not apply to an illegitimate person whose father or mother was married to a third person when the illegitimate person was born. When the exception was removed by s. 1(1) of the Legitimacy Act 1959, the three children became legitimate so far as the law of England was concerned. However, s. 1(2) of the 1959 Act incorporated s. 10(2) of the 1926 Act, subject to the references to the commencement of the 1959 Act. Section 10(2) provided that nothing in the Act of 1926 should affect the operation or construction of any disposition coming into operation before the commencement of the Act.

Regarding the law of Scotland, though the common law had for centuries admitted the doctrine of legitimation *per subsequens matrimonium*, it was subject to the qualification that the parents of the child should have been free to marry each other at the date of its conception. This qualification was removed by s. 4 of the Legitimation (Scotland) Act 1968, which contains in s. 7(2) a provision to the same effect as s. 10(2) of the English Act of 1926.

Doubts having arisen as to whether the three children of Mrs. Holmes qualified as members of the classes which the testator and testatrix, Mr. and Mrs. Wright, intended to benefit, a special case was presented for the opinion and judgment of the Court of Session by the respective trustees as parties of the first part, Rupert David Dundonald Callender as party of the second part and the three children of Mrs. Holmes as parties of the third part.

Two questions were posed by the special case - on a proper construction of the trust disposition and settlement of each of Mr. and Mrs. Wright and in the circumstances which had occurred, whether the parties of the third part fell within the class of 'issue' and whether they fell within the class of 'great-grandchildren', for the purposes of the trust dispositions and settlements.

The questions were answered in the affirmative by the Court of Sessions. The second party appealed to the House of Lords.

Held:

[1] The parties of the third part did not fall within the class of 'issue' and 'great-grandchildren' for the purposes of the trust dispositions and settlements.

(a) The testator and testatrix did not intend that when the succession opened in 1989, the class of beneficiaries should include 'issue' and 'great-grandchildren' who answered the description of 'lawful' by reason only of changes in the law occuring after their testamentary dispositions had come into operation in 1917 and 1932.

(b) A testator is not to be regarded as having contemplated that there might be a change in the law between his death and the opening of the succession. The more natural intention to attribute to him is that the succession should be regulated by the law as it stood at the time of his death. There was certainly no reason to suppose that the testator or the testatrix in this case might have contemplated the possibility of the law of Scotland being changed before the period of vesting so as to result in the legitimation of persons previously incapable of it, or of the law of England or or any other foreign country being changed to similar effect with consequent recognition in Scotland of the legitimacy of persons benefiting from the change.

[2] The legitimacy conferred on the great-grandchildren was subject to limitation.

Though the references in the two trust dispositions and settlements to 'issue' and to 'great-grandchildren' were properly to be construed as limited to issue and to great-grandchildren who were legitimate children of their parents recognised as such by the law of Scotland, and while it is for the law of Scotland to recognise the status of legitimacy conferred by the Legitimacy Act 1959 on the children of fathers domiciled in England at the time of the relevant marriage, it must also be appropriate for that law to recognise that the legitimacy so conferred was subject to limitation, as provided by s. 10(2) of the 1926 Act. The Scots law must for its own purposes of conflict of laws treat the same limitation as applicable as regards instruments governed by Scots law which came into operation before the commencement of the English Act. There is no reason why Scots law should treat a legitimation which is not complete for purposes of English law as complete for its own purposes.

[3] Furthermore, the Scottish Legitimation Act of 1968, which had similar effect to the English Act of 1959, contains in s. 7(2) a provision to the same effect as s. 10(2) of the Act of 1926. It was clear from the terms of the Acts of 1926, 1959 and 1968 that Parliament was concerned that deeds throughout Scotland and England which were already in operation should not be affected by the emergence of newly legitimated persons.

[Note - Lord Slynn of Hadley held that 'issue' and 'great-grandchildren' in the respective trust dispositions and settlements were to be read as meaning issue and great-grandchildren who were legitimate according to the relevant law in force at the time when the bequest fell to vest even if there was a change in the law between the deeds and the vesting. However, he agreed with the other Lords regarding the effect of the limitation that the legitimation did not extend to capacity to inherit under an English instrument which came into operation before the commencement of the Legitimacy Act 1959.**]**

[Appeal allowed].

Cases referred to:

Cockburn's Trustees v. Dundas [1864] 2 M. 1185 ***(refd)***
Nimmo v. Murray's Trustees [1864] 2 M. 1144 ***(refd)***
Maxwell v. Maxwell [1864] 3 M. 318 ***(refd)***
Smith's Trustees v. Macpherson [1926] SC 983 ***(refd)***
Spencer's Trustees and Ruggles [1981] SC 289 ***(refd)***
Bell v. Cheape 7 D. 614 ***(refd)***
Allan, Petr. [1991] SLT 203 ***(refd)***
Trustees v. G [1936] SC 837 ***(refd)***

Legislation referred to:

Intestate Moveable Succession (Scotland) Act 1855
Legitimacy Act 1926, ss. 1(1)(2), 10(1)(2)

Legitimacy Act 1959, ss. 1(1)
Legitimacy (Scotland) Act 1968, ss. 4, 7(2)

JUDGMENT

Lord Keith of Kinkel

My Lords,

The late John Patrick Wright, Writer to the Signet ("Mr. Wright") died on 19 September 1917 leaving a Trust Disposition and Settlement dated 16 September 1912. He was survived by his widow ("Mrs. Wright"), by one daughter Mrs. Violet Moncreiff Lockhart Wright or Callender ("Mrs. Callender") and by four children born to Mrs. Callender, Hyacinth, Winifred, Richard and David. The provisions of the Trust Disposition and Settlement were complicated, and it is sufficient to say that the fee of the residue of the estate, after liferents in favour of Mrs. Wright and after her death in favour of Mrs. Callender, was destined to such of his grandchildren as should survive the period of distribution, together with the issue of any grandchild who might have predeceased the period of vesting, equally among them *per stirpes*. However, Mr. Wright by the Trust Disposition and Settlement conferred upon Mrs. Wright absolute power at any time during her life to alter its purposes and provisions. Mrs. Wright exercised this power by three deeds of variation of different dates, the principal effect of which as regards the residue of the estate was that certain funds were to be held for each of her grandchildren in liferent and their issue in fee with provision for accretion to the others and their issue in the event of any grandchild dying without leaving issue.

Mrs. Wright died on 21 December 1932 leaving a Trust Disposition and Settlement dated 20 June 1925 the effect of which so far as material was that (a) certain specific funds and (b) the residue of the estate were to be held in liferent for the last survivor of her grandchildren and upon the death of such last survivor to be paid (a) to the surviving great-grandchildren of Mrs. Wright "being children of" her granddaughters and younger grandson and (b) to surviving issue of such last surviving grandchild.

Mrs. Callender died in July 1953. Her son David died on 15 September 1977 survived by one son, Rupert David Dundonald Callender. Her daughter Winifred died without issue on 11 November 1982 and her son Richard, also without issue, on 24 January 1987. Hyacinth, the last surviving grandchild of Mr. and Mrs. Wright, died on 2 April 1989. She was survived by three children, Anna, Hugo and Winifred born respectively on 15 September 1942, 29 February 1944, and 6 September 1946. At the time they were born Hyacinth was not married to their father, Alfred Holmes. He was then married to someone else and thus not free to marry Hyacinth. However, he later became free to marry her and did so on 6 August 1954, and she then became Mrs. Holmes. At all material times the family were domiciled in England. The children were not legitimated on the date of the marriage because, by virtue of s. 1(2) of the Legitimacy Act 1926, the legitimation provisions of s. 1(1) did not apply to an illegitimate person whose father or mother was married to a third person when the illegitimate person was born. However, this exception was removed by s. 1(1) of the Legitimacy Act 1959, and the three children therefore became legitimate, so far as the law of England was concerned, three months after 29 July 1959, the date of the passing of the Act. The common law of Scotland has for centuries admitted the doctrine of legitimation *per subsequens matrimonium* but subject to the qualification that the parents of the child should have been free to marry each other at the date of its conception. That qualification was removed, with effect from 8 June 1968, by s. 4 of the Legitimation (Scotland) Act 1968.

At the time of her death Mrs. Holmes was liferented in certain funds under the two Trust Dispositions and Settlements, vesting of the fee being postponed till her death. So far as Mr. Wright's Trust Disposition and Settlement is concerned the persons entitled to the fee are the surviving "issue" of Mrs. Holmes, whom failing the surviving "issue" of her brother David. Under Mrs. Wright's Trust Disposition and Settlement the persons entitled to the fee are Mrs. Wright's surviving "great-grandchildren".

Doubts having arisen as to whether the three children of Mrs. Holmes qualified as members of the classes which Mr. and Mrs. Wright, on a true construction of their testamentary dispositions, intended to benefit, a Special Case was presented for the opinion and judgment of the Court of Session by the respective

trustees as parties of the first part, Rupert David Dundonald Callender as party of the second part and the three children of Mrs. Holmes as parties of the third part.

The questions posed by the special case are these:

1. On a proper construction of the Trust Disposition and Settlement of each of Mr. Wright and Mrs. Wright and in the circumstances which have occurred, do the Parties of the Third Part fall within the class of 'issue' for the purposes thereof ?
2. On a proper construction of the Trust Disposition and Settlement of Mrs. Wright and in the circumstances which have occurred, do the Parties of the Third Part fall within the class of "great-grandchildren" for the purposes thereof?

On 25 October 1991 an Extra Division of the Inner House of the Court of Session (Lords Allanbridge, Cullen and Brand) pronounced an interlocutor answering both questions in the affirmative: (1992 SLT 498). The second party now appeals to your Lordships' House.

It is common ground between the appellant and the respondent third parties that the references in the two Trust Dispositions and Settlements to "issue" and to "great-grandchildren" are properly to be construed as limited to issue and to great-grandchildren who are legitimate children of their parents recognised as such by the law of Scotland. There is no doubt that at the period of vesting in 1989 the third parties were so recognised, though perhaps not without qualification. I will consider that point later. The dispute turns on whether or not, on a true construction of the two deeds, the makers of them intended that possession of the status of legitimacy at the period of vesting should be determinative of the qualification to take as a beneficiary, or whether the intention was that only those persons who would have been recognised as legitimate by the law of Scotland at the time when each deed came into operation should be so qualified. In 1917 and in 1932 children of parents who were not free to marry at the time of conception, but who had later become free to marry and had married, were not recognised as legitimate by the law of Scotland in the case both of the father having been domiciled in Scotland at the date of the marriage and of his having been domiciled in England at that date. There is certainly no reason to suppose that the testator or the testatrix might have contemplated the possibility of the law of Scotland being changed before the period of vesting so as to result in the legitimation of persons previously incapable of it or of the law of England or any other foreign country being changed to similar effect with consequent recognition in Scotland of the legitimacy of persons benefiting from the change.

There is no reported case, so far as the industry of Counsel has revealed, in which consideration has been given to the effect of a change in the law concerning legitimacy in the period between the coming into operation of an instrument and the opening of the succession. However, a somewhat similar situation arose, in connection with changes in the Scots law of intestate succession, in *Cockburn's Trustees v. Dundas* [1864] 2 M. 1185. Baron Cockburn died in 1820 leaving a trust disposition and settlement dated in 1814 by which he directed that the residue of his estate, after the expiry of certain liferents, should be paid over "to and in favour of my own nearest heirs and executors whatsoever alive at the time of distribution, and residing in Scotland, equally among them, share and share alike." The last of the liferents expired in 1862, by which time all the testator's children but one, who resided in India, had died. There were numerous grandchildren of the testator then living, and also a number of great-grandchildren born to grandchildren who had predeceased the expiry of the liferents. Under the law of moveable intestate succession in Scotland as it stood at the time of the testator's death the heirs in *mobilibus* of a person deceased were those who stood in the same relationship to him with no representation by the issue of anyone who had predeceased. Thus for example the surviving children of the deceased would take to the exclusion of issue of a child who had predeceased him. By the Intestate Moveable Succession (Scotland) Act 1855 the law was changed so as to admit of such representation. The primary argument before the Second Division revolved round the question whether the succession was a testate or intestate one, and indeed no contentions were put forward by great-grandchildren of the testator whose parents had predeceased the expiry of the liferents. It was decided that

the succession was a testate one, and that the estate should be divided among the grandchildren, share and share alike. Lord Justice-Clerk Inglis said at pp. 1189-1190:

> The next question is, whether the nearest heirs in *mobilibus* in 1862 are the parties who would succeed under the old law of succession, or those who would suceed *ab intestato* under the Act of 1855. That is no doubt an important question, but I think it is to be solved by giving effect to the principle, that we must follow as nearly as possible the mind and will of the testator, for this is a case of testate and not of intestate succession. Has the testator so bequeathed the residue of his estate as to express his mind and will that it should go to those who would succeed according to the distribution of the law? It would have been easy for him so to bequeath the residue of his estate expressly, as if he had said, After the death of the liferenters then let the law interfere and distribute the residue of my estate. In that case the law at the death of the last liferen-ter would be the rule for the distribution of the estate. But the question here is, has the testator by what he has said so resigned and given up his own purpose as to his succe-ssion as to commit to the law to make his will for him? I cannot so read this clause. I think that what the testator had in his mind was, that there were various classes of his heirs in *mobilibus*, the one of whom might succeed as the other failed. If his heirs in *mobilibus* of the first class survived, and were resident in Scotland, they were to take in the first instance; then those who, according to the then existing law, would be the next class of his heirs in *mobilibus* should take next, and so on. He certainly did not contemplate that the law of succession would be altered before the lapse of the period of endurance of the liferents. When the testator directs the distribution of his estate without saying expressly that the law at the period of distribution, whatever that law may be, shall regulate the distribution of the fee of the residue of my estate, was it not more natural that he should have in his mind the law as it then stood, and that he should intend and contemplate that in the event of his children not taking the fee the class pointed out by the then existing law should come in and take the residue, excluding those who were not resident in Scotland? I think that by adopting that view more than by any other we shall give effect to the intention of the testator.

Lord Cowan said at p. 1192:

> I cannot hold that the Intestacy Act can be viewed as having any legitimate operation on the rights of the claimants to take equally, and share and share alike. The question is, who are the parties to whom the truster destined his moveable succession, when he directed it to be conveyed to his nearest heirs and executors? The answer seems to be - those parties who, under that character, as he understood the meaning and effect of the words, are within the description. And accordingly no claim has been made for great-grandchildren whose parents predeceased the time of distribution.

And Lord Benholme at p. 1193 said:

> But I confess I think there may be doubt on the point whether great-grandchildren are not entitled to share, on the construction that the testator left it to the law as it might stand at the opening of his succession to determine who were his nearest heirs and executors. Had the Intestate Succession Act passed before Baron Cockburn's death I would have inclined to the opinion that the settlement would have brought in great-grandchildren, as by direction of law equally near with grandchildren; but, on the whole, when I see that Baron Cockburn never could have foreseen the change, I think we must estimate his intention by the law he knew of, rather than by the law he knew nothing of.

Lord Neaves dissented on this point, expressing the view, at p. 1193, that the testator meant to bequeath the succession to those who should at law be his heirs in *mobilibus* at the time of distribution.

The cases of *Nimmo v. Murray's Trustees* [1864] 2 M. 1144 and *Maxwell v. Maxwell* [1864] 3 M. 318, which were referred to in argument, did not raise the same point. Both cases concerned a testator who died after the Act of 1855 leaving testamentary dispositions dated before it and containing reference in one case to "nearest heirs and successors" and in the other to "heirs, executors, and assignees". It was held in each case that heirs ascertained by reference to the Act of 1855 were entitled to take. I regard this as no more than a reflection of the established doctrine that a will is ambulatory and speaks from death. As Lord Justice-Clerk Inglis said in *Nimmo v. Murray's Trustees* at p. 1149, a testator so long as he is of sound disposing mind must be

held to know of changes that have taken place in the law of succession, and if he does not make any alteration in his will before his death so as to show that he intended the old law to have effect then the new law must have effect.

Counsel for the third parties relied on certain passages in the judgments in *Smith's Trustees v. Macpherson* [1926] SC 983 and in *Spencer's Trustees and Ruggles* [1981] SC 289 as indicating that in all cases the question whether a person is entitled to take as answering the description of an "heir" or a "child" is to be determined by the law of the domicile of the ancestor or the parent at the time when the succession opens. Again, neither of these cases was concerned with the situation where there has been a relevant change in the applicable law between the coming into operation of the instrument and the opening of the succession. The actual decision in *Spencer 's Trustees and Ruggles* was that on a proper construction of the trust deed taking into account the whole context the expression "lawful children" did not include a child adopted under the law of Illinois and recognised by that law as a lawful child for all purposes of inheritance.

The only guidance relevant to a solution of the problem posed in the special case is thus to be found in the opinions expressed by the majority of the judges in *Cockburn's Trustees v. Dundas*. These opinions indicate that a testator is not to be regarded as having contemplated that there might be a change in the law between his death and the opening of the succession, and that the more natural intention to attribute to him is that the succession should be regulated by the law as it stood at the time of his death. Applying that approach to the circumstances of the present case the conclusion must be that the testator and the testatrix did not intend that when the succession opened the class of beneficiaries should include "issue" and "great-grandchildren" who answered the description of "lawful" by reason only of changes in the law occurring after their testamentary dispositions had come into operation.

While that is sufficient for the determination of the appeal, it is appropriate to deal with another aspect of the case. The English Legitimacy Act 1959, which introduced the legitimation of children whose parents had not been free to marry at the time of their births but had later legally done so, by s. 1(2) incorporated s. 10(2) of the Legitimacy Act 1926 subject to the substitution for references to the commencement of that Act of references to the commencement of the Act of 1959. Section 10(2) provided that nothing in the Act of 1926 should affect the operation or construction of any disposition coming into operation before the commencement of the Act. There may be room for argument as to whether "any disposition" describes only dispositions governed by English law or whether it includes also dispositions governed by some foreign law, but whether or not that be so it remains true that the class of persons legitimated by the Act of 1959 were not legitimated for all purposes of English law. The legitimation did not extend to capacity to inherit under an English instrument that came into operation before the commencement of the Act. While it is for the law of Scotland to recognise the status of legitimacy conferred by the Act on the children of fathers domiciled in England at the time of the relevant marriage, it must also be appropriate for that law to recognise that the legitimacy so conferred was subject to limitation. So in my opinion the correct view is that Scots law must for its own purposes of conflict of laws treat the same limitation as applicable as regards instruments governed by Scots law which came into operation before the commencement of the English Act. I see no reason why Scots law should treat a legitimation which is not complete for purposes of English law as complete for its own purposes. This consideration has the more force when it is kept in mind that the Scottish Legitimation Act of 1968, which had similar effect to the English Act of 1959, contains in s. 7(2) a provision to the same effect as s. 10(2) of the Act of 1926. It would be a strange result indeed if Scots law, while not recognising legitimation by the Act of 1968 as qualifying a person to inherit under a Scottish instrument coming into operation before the commencement of that Act, were forced to recognise as so qualifying a person legitimated by the Act of 1959, notwithstanding the limitation by that Act of the right to inherit under an English instrument.

Again, if the matter is looked at from the point of view of the intention to be attributed to the maker of a Scottish instrument coming

into operation before the commencement of both the Act of 1959 and that of 1968, it is absurd to suppose that the intention might have been to treat as qualified to inherit a person legitimated by the English Act but not a person legitimated by the Scottish Act.

My Lords, for these reasons I would allow the appeal and answer the two questions in the special case in the negative. The costs of both parties, by agreement, will be paid on an agent and client basis out of the trust estate.

Lord Jauncey Of Tullichettle

My Lords,

I gratefully adopt the account of events given in the speech of my noble and learned friend, Lord Keith of Kinkel, with which speech I concur.

It is matter of agreement between the parties that when the testator and the testatrix used the terms "issue" of grand-children and "great-grandchildren (being children of my said younger grandson and granddaughters)" in their respective Trust Dispositions and Settlements to describe the fiars they intended to refer only to those who were legitimate. The dispute between them is as to whether the legitimacy and hence identification of these fiars is to be determined by reference to the law of the domicile of the testator and testatrix at the time of their respective deaths or to the law of the domicile of the parents of the fiars when the succession opened to them many years later. The dispute arises because during the period between the death of the testatrix, who survived the testator, and the opening of the succession to the fiars the law not only of Scotland but of England was altered by statute to treat as legitimate certain persons who at the taking effect of the Trust Dispositions and Settlements would have been treated as illegitimate at common law.

In any question of construction of a testamentary document the court is seeking, as best it can, to ascertain the intention of the testator. In the present case the question must be whether the testator and testatrix intended that the fiars should be only those persons who had been born in wedlock or had been legitimated *per subsequens matrimonium* or whether they intended that any descendant who had been legitimated by supervening legislation in circumstances in which he or she could not previously have been treated as legitimate should be eligible to take as a fiar. The second party who was born legitimate contends for the first alternative the third parties who were legitimated by operation of the Legitimacy Act 1959 contend for the second. Before turning to consider a number of authorities which were said to be relevant to this question I should point out that there is nothing in either of the Trust Dispositions and Settlements which suggests that the testator or testatrix intended that any special meaning should be given to the terms "issue" and "great-grandchildren", except to the extent of the words in parenthesis annexed to the latter terms.

In *Nimmo v. Murray's Trustees* [1864] 2 M. 1144 a testator, one month before the passing of the Intestate Moveable Succession (Scotland) Act 1855, executed a testamentary settlement whereby the residue of his estate was destined to his "nearest heirs and successors". The testator died three months later and a question arose as to whether his nearest heirs fell to be determined by the law at the date of the settlement or at the date of his death, by which time the Act of 1855 had come into effect. It was held that the appropriate law was that at the date of death, Lord Justice-Clerk Inglis at p. 1149 saying:

> Now I think the principle is, that so long as he was of sound disposing mind, and had the power of altering his settlement, he must be held to know of every change that took place in the law of succession, and the effect that that change would have on the destination of the residue of his estate; and if he did not make any alteration to shew that he intended the old law of succession to have effect as regarded his residue, in place of the new law which had been introduced by Act of Parliament, the new law must take effect, ...

A week later the Second Division gave judgment in the case of *Cockburn's Trustees v. Dundas & Ors.* [1864] 2 M. 1185 in which a testator who died in 1820 directed that the residue of his estate should on the expiry of certain life rents be paid over to "my own nearest heirs and executors whatsoever alive at the time of distribution, and residing in Scotland". The last liferentrix died in 1862

and the question again was whether the "nearest heirs" were those determined by the law as at the date of the testator's death or as at the date of death of the last liferentrix. Lord Justice-Clerk Inglis said at p. 1189:

> If his heirs in *mobilibus* of the first class survived, and were resident in Scotland, they were to take in the first instance; then those who, according to the then existing law, would be the next class of his heirs in *mobilibus* should take next, and so on. He certainly did not contemplate that the law of succession would be altered before the lapse of the period of endurance of the liferents. When the testator directs the distribution of his estate without saying expressly that the law at the period of distribution, whatever that law may be, shall regulate the distribution of the fee of the residue of my estate, was it not more natural that he should have in his mind the law as it then stood, and that he should intend and contemplate that in the event of his children not taking the fee the class pointed out by the then existing law should come in and take the residue, excluding those who were not resident in Scotland? I think that by adopting that view more than by any other we shall give effect to the intention of the testator.

Lord Benholme, agreeing with the Lord Justice-Clerk, concluded his judgment at p. 1193 with these words:

> Had the Intestate Succession Act passed before Baron Cockburn's death I would have inclined to the opinion that the settlement would have brought in great-grandchildren, as by direction of law equally near with grandchildren; but, on the whole, when I see that Baron Cockburn never could have foreseen the change, I think we must estimate his intention by the law he knew of, rather than by the law he knew nothing of.

These two cases neatly illustrate the different results which may flow from a change in the law affecting the character of a beneficiary between the date of execution of the testamentary document and the date of death of the testator and a similar change after the death of the testator but before the succession has opened to the beneficiary.

In *Maxwell v. Maxwell* [1864] 3 M. 318, a testatrix executed a will in 1836 containing a bequest of her moveable estate to A.B. "his heirs, executors, and assignees". A.B. died in 1852 and the testatrix survived till 1858. The issue was once again whether A.B.'s heirs fell to be ascertained by reference to the law as it stood in 1836 or in 1858. It was held that the law in 1858 applied. In delivering the judgment of the First Division Lord Curriehill, after pointing out that the testatrix could not at the date of her settlement know who might eventually fall within the description of A.B.'s heirs, continued at p. 322:

> ... but her intention plainly was, that the same persons, whosoever these might eventually be, who might by law have right to his succession, should also by her settlement have right to her succession. If in all cases destinations to heirs and executors, in settlements or deeds executed prior to the date of the Act in 1855, were to have a different meaning from destinations in precisely the same words in settlements or deeds executed after that date, great confusion would be introduced into successions for a long time to come. But I think that the meaning of all such destinations is just that the succession is to devolve upon the persons who may be pointed out by the law itself, whosever these may happen to be, at the time of the death of the person to whom they may then stand in that relation by the law itself.

The last sentence of the above citation was relied upon by the third parties in support of the proposition that the law to be applied to the description of a class of beneficiaries was, in the absence of specific indications contra, the law applicable at the date when the succession opened to that class. In my view that is to take far too much out of this sentence. The whole passage which I have just quoted is not easy to follow. The persons who would have succeeded to the moveable estate on the death of A.B. intestate in 1852 would have been his heirs according to the pre-1855 law. The last sentence of the passage does not therefore appear to fit the facts to which Lord Curriehill was seeking to apply the law. In the penultimate paragraph of his judgment Lord Curriehill said:

> In the case of Nimmo, 3d June 1864, 2 Macph., p. 1146, the Second Division of the Court construed the Succession Act in the same way as I have done. It is said that in the case of *Cockburn's Trustees*, 10 June 1864, ib. p. 1185, a different decision was pronounced. But I do not think their Lordships in that case put upon the statute a construction different from that which they

> had adopted in the preceding week in the case of Nimmo. That case was attended with specialities. In particular, the only parties who had an interest to plead the statute, namely, the great-grandchildren of Baron Cockburn, were not parties claimants in the Inner-House. And the opinions of some to the Judges, as I understand them, were founded upon the circumstance of the testator having been dead before the Act was passed.

In that passage Lord Curriehill appears to have been concentrating on the construction of the Act of 1855 rather than upon the construction of the settlement as evidencing the intention of the testatrix. I have no doubt that the decision in *Maxwell v. Maxwell* was correct but it was so for the simple reason that the testatrix survived the passing of the Act of 1855 for some three years without altering her settlement and therefore in the words of LJC Inglis in *Nimmo v. Murray's Trustees* "the new law must take effect". I consider that *Maxwell v. Maxwell* provides no support for the contentions of the third parties in a case where the law has changed between the operative date of the settlement and the opening of the succession.

In *Smith's Trustees v. Macpherson* [1926] SC 983 a testator who died domiciled in Scotland in 1901 left a legacy on the expiry of a liferent to J.M. with a destination-over failing issue "to his nearest heirs". J.M. who was domiciled in England at the date of death of the testator died domiciled there in 1917 survived by the liferentrix. On her death in 1924 a question arose as to whether J.M.'s nearest heirs fell to be ascertained according to the law of Scotland or England. The First Division held that the relevant law was that of England being the law of J.M.'s domicile at the date of his death. Lord President Clyde, after giving the example of a bequest to "my brother's heirs," continued at p. 990:

> Further it seems evident, in the absence of controlling context, that the question - Who are the persons who would succeed to the testator's brother on the said brother's fictional intestacy? - must depend for answer on the law of the brother's domicile. For the brother's 'heirs' are incapable of ascertainment in any other way; and, if any other method were adopted, the persons called to succeed would not be **his** 'heirs'.

Lord Sands at p. 991 after pointing out that the word "heir" connoted not a natural but a legal relationship went on to say:

> It is a rule of international law, adopted by Scots law, and therefore part of the law of Scotland, that the persons entitled to the moveable succession of an intestate, in other words the heirs, are the persons who are so entitled by the law of the deceased's domicile.

Lord Ashmore at p. 994 said:

> Moreover, it is not doubtful that the nearest heirs of the legatee must be those who are entitled to succeed as the legal representatives of the legatee according to the law of his domicile - *Bell v. Cheape*, 7 D. 614, *per* Lord Mackenzie, p. 633, and Lord Jeffrey, p. 637. Further, it may be laid down as a general rule of law that, when a right of succession is conferred by a testator on parties - called, not as individuals, but because of their relation to the third parties, those entitled to succeed are persons answering the description or holding the character when the succession opens or takes effect - *Maxwell v. Maxwell* [1864] 3 Macph. 318.

The last sentence of the above passage, which substantially echoes what Lord Curriehill said in the earlier case, was much relied upon by the third parties. However, I do not consider that it can properly be construed as stating that the description of the persons in question is to be determined by reference to the law prevailing at the time of the opening of the succession rather than at some earlier time. That was not an issue in *Smith's Trustees v. Macpherson*, there being no suggestion that the law of England had changed between 1901 and 1924. The only issue was whether "heirs" fell to be determined by reference to the law of the testator's domicile or the law of the domicile of the person whose heirs were to benefit. Furthermore, it must be born in mind as Lord Sands pointed out that heirship is a legal relationship whereas in this appeal the concern is with the natural relations of the propositus, a distinction which was emphasised in the recent case of *Allan, Petr.* [1991] SLT 203 Opinion of the court at p. 205. I am therefore satisfied that *Smith's Trustees v. Macpherson* affords no support for the third parties' contention.

Your Lordships were also referred to *Spencer's Trustees and Ruggles* [1981] SC 289 in which

it was held by the First Division that as a matter of construction a provision in a trust deed in favour of the son of the Truster in liferent and his surviving lawful children in fee did not embrace a child adopted by the liferenter and recognised for all practical purposes as his lawful child by the law of his American domicile at the date of his death. The Truster died in the early years of this century and the decree of adoption was pronounced in 1970. Lord President Emslie at p. 297 said "There is no doubt that the 'lawful children' of Henry Arthur Spencer are those persons who are so regarded by the law of his domicile at the date of his death". Lord Cameron expressed views to a similar effect at p. 294. If these statements were intended to equiparate the position of "children" to that of "heirs" I do not think that they were correct. The heir of X can only be ascertained at or after the moment of X's death and according to the law of X's then domicile, because the relationship between X and his heirs is a creation of the law. The relationship of parent and child is a natural one and *prima facie* depends upon fact. A child of a liferenter can be ascertained during the life of the former and in the case of a liferentrix the class of her children can be treated as closed on her 53rd birthday (*G.'s Trustees v. G.* [1936] SC 837). However, Lord Cameron at p. 295 said:

> The decision in any given case of the width of the ambit of the words 'lawful children' must depend on the proper construction of the deed in which the words appear, their context and the intention of the maker of the deed as that may be ascertained from an examination of the deed itself.

The Lord President at p. 298 stated the question to be whether the adopted daughter "qualifies as one of the 'surviving lawful children' of Henry within the meaning of, and for the **purposes of succession** under" the relevant provisions of the Trust Deed (emphasis added).

When there is a gift to a class of descendants with postponed vesting it is obvious that the members of the class who will benefit cannot be ascertained until the date of vesting. There is however nothing in the authorities to which I have referred which requires that the law which determines who is eligible to be a member of the class must always be the law of the domicile of the parent of the class member at the date of death of the parent or when the succession opens to the members. This must be purely a matter of testamentary intention. The use of the word "issue" and "great-grandchildren" in 1917 and 1932 respectively without any other qualification or explanation would have embraced only persons born in wedlock or legitimated *per subsequens matrimonium*. Testators in those years would have had in mind the law as it then stood and would have been most unlikely to have contemplated that it would change to treat as legitimate persons who could not then have been legitimated at common law. The words of Lord Justice-Clerk Inglis and Lord Benholme in *Cockburn's Trustees v. Dundas* to which I have already referred are most apposite to the present case and I reject the contention of the third parties that the testators must be presumed to have used language wide enough to cover potential changes in the law. To introduce into the succession persons who could not have succeeded when the settlements came into operation would be to innovate upon the terms of those deeds - something which should in my view be done only by specific legislation. That is sufficient for disposal of this appeal in favour of the second party but there is a further matter which also has relevance, *inter alia*, to the intentions of the testator and testatrix.

The Legitimacy Act 1926 introduced into England for the first time the Scots law doctrine of legitimation *per subsequens matrimonium*. The Legitimacy Act 1959, which applied only to England and Wales, amended the Act of 1926 to the effect of legitimating a child of parents who subsequently married even although they had not been free to marry at the date of the child's birth. This had the effect of rendering legitimate the third parties as from the date thereof. However, s. 10(1) of the 1926 Act, when read together with the 1959 Act, provided that the construction of any disposition coming into operation after the commencement of the 1959 Act should not be affected. Thus the third parties, although legitimated by the Act of 1959, could not have taken a bequest to issue or great-grandchildren under an English deed coming into operation before 1959. Is it to be supposed that even if the testators had contemplated the possibility of some change in the law of legitimation they would have intended to benefit persons who

although treated as legitimate in the country of their domicile for certain purposes were, nevertheless, disabled in that country from taking benefit from deeds such as those about to be executed by them? The answer must, I think, be "no".

Scots law was amended by the Legitimation (Scotland) Act of 1968 to the same effect as English law had been by the 1959 Act. Section 7(2) of the 1968 Act provided that the legitimation of any person under the Act should not confer any right on that person under a deed which came into operation before the commencement of the Act. It is clear from the terms of the Acts of 1926, 1959 and 1968 that Parliament was concerned that deeds throughout Scotland and England which were already in operation should not be affected by the emergence of newly legitimated persons. If the arguments for the third parties were correct it would mean that domiciled English persons legitimated under the 1959 Act could not benefit under an English deed in operation prior to their legitimation but could benefit under such a Scottish one *et e contra*, a result which would certainly not appear to accord with the general intention of Parliament as expressed in the English and Scottish Acts. An example will suffice to show how bizarre could have been the effect of the third parties' argument in the present case. Of the testator's two grand-daughters only the mother of the third parties had children. Suppose that the other granddaughter had, by a domiciled Scotsman, children who were subsequently legitimated by the Act of 1968. Those children would have been disabled from taking benefit under the settlements by reason of s. 7(2) of the 1968 Act but their first cousins, being domiciled in England, would not. While these matters are not conclusive as to testatmentary intention, they do fortify the conclusion that the contentions of the third parties must be rejected.

My Lords for all these reasons I would allow the appeal, recall the interlocutor of the Court of Session of 25 October 1991 and answer both questions in the special case in the negative.

Lord Lowry

My Lords,

I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Keith of Kinkel and Lord Jauncey of Tullichettle. I agree with them and for the reasons given by my noble and learned friends I, too, would allow the appeal.

Lord Mustill

My Lords,

I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Keith of Kinkel and Lord Jauncey of Tullichettle. I agree with them and for the reasons given by my noble and learned friends I, too, would allow the appeal.

Lord Slynn of Hadley

My Lords,

I accept Mr. Emslie's submission on behalf of the parties of the third part that "issue" and "great-grandchildren" in the respective Trust Dispositions and Settlements are to be read as meaning issue and great-grandchildren who were legitimate according to the relevant law in force at the time when the bequest fell to vest even if there was a change in the law between the deeds and the vesting. I recognise that this is not in accordance with the decision of the Second Division of the Inner House in *Cockburn's Trustees v. Dundas & Ors.* [1864] 1 M. 1185 but it is in my view consistent with all the other cases cited to the Appellate Committee.

That, however, does not enable the Third Parties to succeed. For the reasons given by my noble and learned friends, Lord Keith of Kinkel and Lord Jauncey of Tullichettle, whose speeches in draft I have had the opportunity of reading, it is impossible when recognising that the Third Parties were legitimated by the Legitimacy Act 1959, the law of their domicile, to ignore the limitation that the legitimation did not extend to capacity to inherit under an English instrument which came into operation before the commencement of that Act.

For that reason I too would allow the appeal.

Reported by Shamsiah Begum Subhan.